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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 229

JULIA C. COLLINS AND HATTIE L. MOSHER,
Petitioners,

vs.

JOE O'CONNELL AND JESSIE B. O'CONNELL, HUSBAND AND WIFE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

THOMAS OWEN MARLAR,
Counsel for Petitioners.

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vs.

JOE O'CONNELL AND JESSIE B. O'CONNELL, HUSBAND AND WIFE.
Respondents.

REPLY BRIEF OF PETITIONERS.

Errors in Respondents' Brief.

After having admitted jurisdiction of this Court respondents claim that no ground for review is presented under Subdivision 5, of Rule 38, of this Court. Page 3, of respondents' Brief in Opposition.

It is respectfully submitted that this is in error.

First—Because the Circuit Court of Appeals, Ninth Circuit, decided an important question of local law in a way probably in conflict with local decisions.

Second—The Appellate Court decided an important decision of general law in a way untenable and in conflict with the weight of authority. Rule 38, subsection 5 (b).

It was clearly shown in Petitioners' Brief in support of the Petition for Writ of Certiorari that the foregoing prerequisites of Rule 38, subsection 5 (b), were herein involved.

In the respondents' brief, page 4, it is stated:—

> "The petitioners also suggest conflict between the decision in this case and the decision of the Sixth Circuit in the case of State Bank of Hardinsburg *v.* Brown, 317 U. S. 135."

This is in error, likewise, as petitioners contend that the decision in the instant case is in conflict with:

Findlay v. *Pertz,* 66 Fed. 427, 434.

Bank of Hardinsburg v. *Brown, supra,* was cited solely to show that when there is a conflict of two separate circuits certiorari will be granted. Petitioners' Brief, page 4.

Estoppel.

There can be no estoppel on the Petitioner Julia C. Collins as the Power of Attorney to Hattie L. Mosher was void after the death of Julia Mosher Collins.

Power of Attorney Void After Death.

In *Wash* v. *Wash, et al.,* 189 Mo. 352, 87 S. W. 993, it is stated on page 995:

> "It is true that after her death her attorney filed a certified copy of the election in the recorder's office, but it is too plain for discussion, that when Mrs. Wash died her death revoked all powers of attorney which she had created in her lifetime, and that her attorney, after her death, could not complete her election by filing the copy of her election in the probate office in the recorder's office."

The above rule applies in the instant case and the assignment of mortgage could not be completed after Mrs. Collins' death by recording it.

> "Applying the principles discussed, a power of attorney to convey lands, or to collect debts, is terminated by the principal's death. Further, the attorney after the principal's death, may not complete an undertaking for the benefit of the principal and intended to be completed in the latter's lifetime."
>
> *American Jurisprudence Vol. 2*, paragraph 65, Page 56.

We submit that the above represent the universal weight of authorities.

In the case at bar it follows that the assignment of the mortgage was intended to be completed in Mrs. Collins' lifetime. It was a *pending transaction.* At her death it was not completed. It had no weight as an assignment of a mortgage until it was recorded. An unrecorded mortgage assignment could never be foreclosed. This transaction not having been completed by recordation in the lifetime of Mrs. Collins, the principal of the Power of Attorney, and the power of attorney having ceased to exist after the principal's death, its recordation a year after the authority of Hattie L. Mosher had ceased to exist could *not revive the dead.* The universal weight of all authorities is that *no pending transaction* can be completed after the death of the principal.

On page 16 of the Petition for Writ of Certiorari it will be seen that in addition to the decision of the Ninth Circuit being in conflict with the Sixth Circuit in *Findlay* v. *Pertz* it is also in conflict with a decision of the Eighth Circuit.

Conclusion of Reply.

In conclusion it is respectfully submitted that a Writ of Certiorari is entitled to be granted and the case reviewed by this Honorable Court wherein we pray for a reversal.

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